**DISTRICT OF COLUMBIA**
**OFFICE OF ADMINISTRATIVE HEARINGS**
441 4th Street, NW, Suite 540-S
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| J.M.<br>Petitioner,<br><br>v.<br><br>DISTRICT OF COLUMBIA<br>DEPARTMENT ON DISABILITY SERVICES<br>Respondent | Case No.: HS-P-07-101751 |

# FINAL ORDER

## I. Introduction

On August 7, 2007, Petitioner J.M., through counsel, filed her request for a hearing. Petitioner challenges various alleged actions and inactions allegedly taken by Respondent District of Columbia Department on Disability Services ("DDS") and its predecessor, District of Columbia Department of Human Services ("DHS"), with regard to the Rehabilitation Services ("RSA") program.[1]

In essence, Petitioner contends the following: (1) Respondent failed to meet an asserted responsibility, under RSA law, to identify Petitioner as a person eligible to receive RSA services and to provide services to her, during the time that Petitioner received special education services from D.C. Public Schools; (2) Respondent failed to timely determine Petitioner's RSA eligibility; (3) Respondent failed to properly notify Petitioner of the standards it relied upon in

[1] The Developmental Services Management Reform Act of 2006, D.C. Official Code §§ 7-761.01 *et seq.,* established Respondent DDS as a new agency of District government, effective July 1, 2007. Under § 7-761.08(b), management authority over the RSA program was transferred from DHS to DDS, effective June 30, 2007. In this case, the term, Respondent, shall refer to both DDS and DHS, to the extent that each agency has administered the RSA program.

denying her request to attend Hofstra University; and (4) Respondent improperly failed to develop an IPE for Petitioner's educational program for the fall 2007 semester.

Respondent has asserted the following defenses: (1) that it did timely rule on the RSA application; (2) that Petitioner obligated herself to pay for the Hofstra University program before Respondent agreed to fund the program; (3) that Petitioner already has a certificate in film direction/production and does not need an undergraduate program to pursue her vocational goal; and (4) that the school selected was not appropriate under RSA guidelines because it was not accredited.

## II. Order for Default and Motion for Reconsideration

### A. Procedural History

The hearing in this case was initially held on October 9, 2007. Joseph R. Cooney, Esq., appeared on behalf of Petitioner. Turna R. Lewis, Esq., appeared on behalf of Respondent. At that time, the parties made opening statements, and Respondent presented some of its evidence. Cynthia Burley, Chief of Client Services; Darlene Gripper, State Transition Program Manager; Jean Barbour, Administrative Assistant for Youth Transition Services; and Crystal Ford, Vocational Rehabilitation Specialist; all testified for Respondent. Respondent's Exhibits ("RX") 201, 204, 205, 208, 213, 214, 215, 215A, 216, 222, and 224 were admitted into evidence.[2] With the consent of both parties, Petitioner testified out of turn on her own behalf. Petitioner's Exhibits ("PX") 103, 104, 105, 106, and 108 were admitted into evidence.

[2] RX 206, 207 and 225 were admitted subject to Respondent's submission of a copy of the exhibits by the second hearing date. The copies were not provided, and these exhibits were ordered stricken from the record, as part of the Order of Default, dated November 21, 2007.

At the end of proceedings on October 9, 2007, Respondent had not finished presenting its evidence. RSA Supervisor Luanna Stewart was still scheduled to testify for Respondent. Mr. Cooney stated that Petitioner intended to recall Ms. Ford and to call P.M, Petitioner's mother, to testify. The parties agreed to continue the hearing to October 29, 2007 at 1:00 PM.

On October 10, 2007, I issued an Order Continuing Hearing that scheduled Day 2 of the hearing in this case for October 29, 2007 at 1:00 PM. On October 22, 2007, Respondent filed a Motion for Continuance, stating that Ms. Lewis was assigned to attend an out-of-town conference and that she could not appear for the hearing on October 29, 2007. Ms. Lewis represented that she could not reach Mr. Cooney because he was out-of-town on the day the Motion was filed.

On October 23, 2007, Petitioner, through Mr. Cooney, filed a response to the Motion. Mr. Cooney stated that he was unavailable from November 2 through 9, 2007, and that he has another matter before OAH on November 13, 2007 at 10:30 AM. Mr. Cooney further stated that he had not been able to contact J.M.'s mother to determine her availability. Mr. Cooney requested that the case be rescheduled for another date during the week of October 29, 2007.

Based on Respondent's Motion and Petitioner's response, on October 25, 2007 I issued an Order continuing the second day of the hearing to Monday, November 19, 2007 at 9:30 AM. Shortly after I issued this Order, Petitioner filed a statement that P.M. was unavailable on November 19, 2007 but would be available after that date. However, on October 29, 2007, Petitioner filed another statement indicating that Petitioner accepted the November 19, 2007 hearing date, and that Petitioner withdrew her request to reschedule the hearing.

The Order scheduling the November 19, 2007 hearing was served on the parties at their addresses of record and by fax. Respondent was served by inter-agency mail and fax to its listed representatives. The Order was not returned to OAH as undeliverable by the postal authorities. The certificate of service attached to Petitioner's October 29, 2007 submission also stated that it was served by first-class mail to Ms. Lewis, Respondent's counsel, at her address of record. Therefore, Respondent had proper notice of the November 19, 2007 hearing date. *See Dusenbery v. United States*, 534 U.S. 161, 167-171 (2002); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep't of Employment Servs.*, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Servs.*, 487 A.2d 622, 624 (D.C. 1985).

On the morning of November 19, 2007, at approximately 9:00 AM, Ms. Lewis contacted the OAH Clerk's Office by telephone and stated that she was out due to illness and therefore could not attend the hearing in an unrelated matter pending before OAH. The OAH Clerk gave the following account of the conversation with Ms. Lewis: When the OAH Clerk's Office inquired about whether a representative would appear for Respondent in this case, Ms. Lewis responded that she was unaware of this case and that she did not intend to appear for the hearing in this case. Ms. Lewis was asked whether she objected to Ms. P.M. providing a written statement, and Ms. Lewis stated that she objected to any such procedure. I informed Ms. Lewis through the Clerk's Office that I intended to call this case for hearing at 1:30 PM. No written motion has been filed to request a continuance of this hearing.[3]

[3] In fairness to Ms. Lewis, she was advised that the case might be continued. At that time, I was not aware of the fact that no witnesses or representatives had appeared at OAH on behalf of Respondent for the scheduled hearing. I noted in the Order of Default that Respondent should address whether it was in fact prepared to present its case on November 19, 2007 at 9:30 AM.

When the case was called at 1:30 PM, on November 19, 2007, Mr. Cooney appeared on behalf of Petitioner, and Ms. P.M. also attended the hearing. No one appeared on behalf of Respondent. Petitioner then moved for an order of default.

After reciting the procedural history of this case, Mr. Cooney made several additional representations of fact. First, Mr. Cooney stated that the tuition bill for the fall semester at Hofstra University has not been paid at all, and the legal status of the spring 2008 tuition bill is also uncertain. Therefore, Petitioner has a strong interest in having this case adjudicated as soon as possible. Second, Mr. Cooney stated that when the hearing was scheduled to begin at 9:30 AM, there were no witnesses or representatives present on behalf of Respondent. This fact seems to indicate that Respondent did not intend to participate in the hearing at all. Third, Mr. Cooney stated that he had spoken to Ms. Lewis on Wednesday, November 14, 2007 about this case, when both attorneys were present at OAH for another matter. He said that Ms. Lewis was aware of the hearing date at that time.

Petitioner's motion for default was granted on the record. Respondent was found to be in default of the proceedings. The order of default did not mean that Petitioner was granted an order or decision in her favor, but rather that the record of the hearing would include the evidence presented by both parties at the October 9, 2007 hearing, and any evidence presented by Petitioner alone, after Respondent had been found to be in default, on November 19, 2007. In addition, three Respondent exhibits, which had been admitted on the condition that Respondent provide copies of the exhibits as of the second hearing date, were stricken from the record. The case then proceeded with Petitioner's *ex parte* presentation of testimony by P.M. RX 203, pre-filed by Respondent, was admitted as a Petitioner's Exhibit. A list of admitted exhibits is included at the end of this Order.

On November 21, 2007, this administrative court issued a written Order of Default, ordering that Respondent was found to be in default of these proceedings. OAH Rule 2818.3; D.C. Superior Court Civil Rule 39-I(c). The Order of Default also struck from the record the three Respondent exhibits for which no copies had been provided to OAH or Petitioner. The reasons for the issuance of the Order of Default are stated more fully in that Order. That Order also granted Respondent an opportunity, on or before December 10, 2007, to file a motion to vacate the Order of Default for good cause shown.

**B. Respondent's Motion for Reconsideration**

On December 10, 2007, Respondent filed a Motion for Reconsideration. Respondent contested some of the factual assertions contained in the Order of Default, the assertions representing the accounts of the OAH Clerk and Mr. Cooney. Respondent stated that when Ms. Lewis telephoned OAH on the morning of November 19, 2007, she was aware of the hearing in this case and she specifically told the legal assistant who answered the telephone that she was requesting a continuance of the hearing in this case, because she could not participate by telephone in the hearing. However, Ms. Lewis could participate by telephone in the status conference scheduled that morning in the unrelated matter. Respondent then asserted that Ms. Lewis was asked if she would accept a written statement from Petitioner's mother, but Ms. Lewis objected on the basis that she could not cross-examine the statement. Then, according to Respondent, she was asked if she could appear for a 1:30 PM proceeding in this case on the same date, but Ms. Lewis responded that she could not appear in person for any proceeding that day.

Respondent stated that it was ready to proceed with the hearing, before Ms. Lewis became ill. As support for this statement, Respondent attached an email communication with

RSA representatives and a motion for continuance in another matter that referenced this case. Ms. Lewis said that on November 19, 2007, she contacted Mr. Cooney by telephone at 8:30 AM to notify him that she could not attend the hearing due to illness. She said she then telephoned Marlene Jones-Kinney, Court Representative, and told Ms. Jones-Kinney that Ms. Lewis was unavailable due to illness. Apparently, when Ms. Jones-Kinney received this news, she communicated it to the other RSA representatives and witnesses, and no one appeared for the hearing. Respondent represented that it had provided copies of the excluded exhibits to Mr. Cooney, and that it is prepared to submit them to OAH, if the motion is granted.

Respondent also stated that it takes strong exception to Petitioner's claim of prejudice due to the fact that the tuition bill has not been paid. Respondent's position is that this situation is Petitioner's fault because she received notice of the denial of RSA services for Hofstra but attended Hofstra anyway.

Based upon these factual assertions and arguments, Respondent moved to vacate the Order of Default, and to grant a new hearing date. For the following reasons, I will deny Respondent's motion, although Respondent has presented some mitigating factors.

In addressing the motion, it is important to consider the time-sensitive nature of this case. 34 C.F.R. § 361.57(e)(1) requires the due process hearing officer to conduct a hearing within sixty (60) days of the hearing request, unless the parties agree to a specified time. The decision of the hearing officer must be issued within thirty (30) days of the close of the hearing. 34 C.F.R. § 361.57(e)(3)(ii); 29 DCMR 158.1.

The reason for these short deadlines is self-evident. When an RSA client seeks review of an adverse decision, the client needs to have a timely resolution of the issue, even if the decision

is adverse to the client. There are educational decisions to be made, and any extension of time impacts those decisions.

In this case, Petitioner has entered Hofstra and she needs a determination of her rights with regard to RSA services before the end of the December 2007 semester, not only because of the impact on this semester, but also because of the impact on the spring 2008 semester. She has consented to continuances that took the hearing into November 2007, but beyond that, she does face severe prejudice if the case is extended into 2008.

It is unfortunate that Respondent gives short shrift to this concern, but the process needs to go forward, regardless of the merits. Further, as the remainder of this decision will demonstrate, Respondent's position on the merits is not as solid as it believes.

With this consideration in mind, I will address the other points raised by Respondent. First, Respondent has demonstrated that it was prepared to present its evidence at the continued hearing on November 19, 2007. The fact that assigned counsel was sick on the morning of the hearing, in the absence of co-counsel, could constitute good cause to continue the hearing. However, Respondent bypassed the process by not sending any representative to the hearing when the request for continuance was made at the last minute. Respondent simply assumed the request for continuance would be granted. I am not casting blame on Ms. Lewis or Ms. Jones-Kinney or the fact that there does not appear to be counsel who can fill in for Ms. Lewis. However, Respondent is obligated to await a ruling from OAH on the motion for continuance before abandoning the hearing altogether. If Respondent sends no representative to the hearing, this signals to the other party and to OAH that Respondent does not care about the inconvenience to everyone else or that it can bypass the process.

I am disturbed by the fact that Mr. Cooney and Ms. Lewis offer different versions of their communications, or lack thereof, on the morning of the hearing. In addition, I cannot reconcile the two accounts of Ms. Lewis's conversation with the OAH legal assistant. In both cases, I do not need to choose one version over another.

Although Respondent has shown that it made efforts to contact OAH to request a continuance, I will deny its Motion for Reconsideration for two reasons: (1) Respondent abandoned the hearing without waiting for a ruling; and (2) the rescheduling of the hearing, which would go into January 2008, would cause substantial harm to Petitioner's interest and violate 34 C.F.R. § 361.57(e)(1).

Ms. Lewis did contact OAH by telephone to notify OAH of her inability to attend the hearing. In the future, when this situation arises at the last minute, a party seeking continuance should either obtain a verbal order from the ALJ or send a representative to appear at the hearing.

Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

## III. Findings of Fact

### A. Specific Findings

At all times relevant, Petitioner has been a District resident. Petitioner attended the Chelsea School, as a D.C. Public Schools student, prior to June 2007, and she received special education services pursuant to an individualized education plan ("IEP"). Petitioner has a specific

learning disability, identified as mathematics disorder. RX 204 and 205. Petitioner has a vocational goal to become a film producer.

During the fall of 2006, Petitioner's mother was searching the internet and learned of the RSA program, and she thought this program might be helpful to Petitioner. In December 2006, Petitioner's mother contacted the Chelsea School Careers Counselor, Angela Steele, to ask whether Petitioner may qualify for RSA services when she exited high school. Ms. Steele promised to refer Petitioner to the RSA program. In March, 2007, Petitioner's mother telephoned Darlene Gripper, the State Transition Program Manager for RSA's Youth Transition Services Division. Petitioner's mother learned that Ms. Steele had not contacted RSA to that point. Ms. Steele then sent to RSA a Vocational Rehabilitation Transition Referral Form to Respondent's Youth Transition Services Division, dated December 27, 2006. Petitioner's Exhibit ("PX") 106; RX 213. However, this form was actually sent to RSA in April 2007.[4] RX 215A.

On April 3, 2007, Ms. Gripper generated her own Vocational Rehabilitation Transition Referral Form and wrote information from Petitioner's mother on the form. RX 216. On April 9, 2007, Ms. Gripper sent a letter to Petitioner's mother, acknowledging receipt of the referral and explaining the process for determining RSA eligibility.

On April 10, 2007, Jean Barbour, an administrative assistant who worked with Ms. Gripper, referred Petitioner to the RSA Client Services Division, ("CSD") which determines RSA eligibility and provides RSA services to clients. RX 214. The CSD scheduled an

[4] See Section B – Discussion of Credibility, for an analysis of the factual dispute in this case.

orientation program in late April 2007. The case was assigned to Vocational Counselor Crystal Ford, and an initial intake interview was scheduled for May 22, 2007.

The interview was held as scheduled on May 22, 2007. Ms. Ford, Petitioner, and her mother were present. Ms. Ford provided Petitioner a written disclosure of Client's Rights and Responsibilities. RX 222. At the interview, Petitioner disclosed that she had already selected Hofstra University as her school of choice, and she had already applied and been accepted to the Hofstra program. Petitioner selected this program in part because it was willing to accommodate Petitioner's learning disability. PX 103 and 104. Petitioner also informed Ms. Ford that Petitioner had a certificate of completion from Montgomery County Cable Access Channel ("MCCAC"), for its Television Production Class. Ms. Ford did not comment on either the selection of Hofstra or the fact that Petitioner had attended the MCCAC program.

Ms. Ford explained the application process to Petitioner, and told her she needed to apply for financial assistance. Ms. Ford did not determine Petitioner's eligibility for RSA services at that time.

Ms. Ford researched available financial aid for disabled students through the POWERS or PLUS financial aid programs.[5] Hofstra was an approved institution for the D.C. TAP financial assistance program. RX 204.

On July 20, 2007, Respondent found that Petitioner was eligible for RSA services for her vocational goal. There is no evidence that a written notice of eligibility was issued to Petitioner. Respondent considers its eligibility determination to be timely made, because it was made within sixty (60) days after the initial client interview. The eligibility determination was not made

[5] Ms. Ford could not recall which program was available at Hofstra, but she stated that one of them was available.

within sixty (60) days of Petitioner's application for RSA services, which occurred on or before April 3, 2007.

On July 26, 2007, Ms. Ford submitted a Request for a New Vendor to her supervisor. Ms. Ford requested that Hofstra be added as an approved RSA vendor for this client. The reasons for the request were:

> Hofstras Program for Academic Learning Skills (PALS) the program provides time extension on exams, books on tape, assistance with contracting students for note-taking, computer technology, reader for exams, and individualized weekly meetings with a PALS instructor to develop learning skill, time management, organization, decoding, comprehension, listening, studying, written expression, test-taking, and self-advocacy.

RX 205. Ms. Ford advocated for this program because she believed the accommodations were appropriate for Petitioner's disability and educational needs.

Respondent's representatives researched whether the Hofstra film production program was accredited by the National Association of Schools of Art and Design ("NASAD"). Respondent relies upon this accreditation in determining whether the program is appropriate for use of RSA funds. Hofstra is not accredited by NASAD. RX 217 and 218. On this basis, Respondent overruled the request of Ms. Ford and refused to approve RSA funding for Hofstra.

Respondent also denied funding for Hofstra on the basis that Petitioner's vocational goal does not require a Bachelor of Arts Degree. Respondent relied upon the U.S. Department of Labor's Occupational Outlook Handbook, 2006-07 Edition, listing for Actors, Producers, and Directors. RX 223. This publication states that, "[f]ormal training through a university or acting conservatory is typical; however, many actors, producers, and directors find work on the basis of their experience and talent alone." RX 223 p. 1. The publication also indicates that, "[n]o

formal training exists for producers; however, a growing number of colleges and universities now offer degree programs in arts management and in managing nonprofits." RX 223 p. 4.

Respondent has not issued any regulations that address the selection of educational vendors. Respondent relied upon provisions of federal law, including 34 C.F.R. § 361.52, regarding informed choice by a client and the requirement of certification of educational vendors. Respondent applies a rule that all such vendors must be appropriately accredited.

On July 31, 2007, Respondent issued a written notice denying Petitioner's request for RSA funding to attend Hofstra. The content of the written notice is not part of the record.[6]

Hofstra is generally an accredited university. PX 104. On the www.college-scholarships.com/learning_disabilities.htm website, Hofstra is listed as an educational institution that provides extraordinary services to individuals with disabilities. PX 103. The University of the District of Columbia ("UDC"), and Montgomery College, both of which Respondent uses as preferred local educational vendors, are not listed on this website.

Petitioner sought reconsideration of Respondent's decision in August 2007. On August 28, 2007, Petitioner met with Ms. Ford to discuss the case. Petitioner was scheduled to begin classes at Hofstra the next day. Petitioner offered to change her major so she could attend Hofstra, because Petitioner was impressed with Hofstra's accommodations. Ms. Ford stated that she should continue with her vocational goal, if that was what she wanted to do.

Ms. Ford told Petitioner that she was denied in part because she has been certified through the MCCAC and does not need an undergraduate degree for this field. However, Ms.

[6] Testimony of Ms. Ford, Petitioner's mother, and Petitioner. The written notice was conditionally admitted as part of RX 206, but a copy was never submitted, and so it was stricken from the record. I find only that it was issued, but I can make no findings about its content.

Ford told Petitioner, inconsistently, that Respondent would consider providing funding for a local program, perhaps through Montgomery College.

Petitioner has attended Hofstra for the fall 2007 semester. The status of the billing for this program is not determined.

**B. Discussion of Credibility**

Most of the pertinent facts are not in contention. There is one significant factual dispute between the parties. Petitioner contends that her mother notified RSA as early as January 2007 that Petitioner was seeking RSA services after her high school graduation. Respondent claims that the first contact it received from anyone on behalf of Petitioner was in March 2007, and that Ms. Gripper first spoke with Petitioner's mother in early April 2007. Even if Respondent's version is correct, it still acted in an untimely manner in determining Petitioner's eligibility (although its position is that the determination was timely made). However, the length of the delay is significant in determining the appropriate remedy.

Petitioner's mother testified credibly that she contacted Ms. Steele, the high school guidance counselor, in December 2006 about the RSA program for Petitioner, and Ms. Steele promised to make a referral to RSA on Petitioner's behalf. All witnesses agreed that Ms. Steele did not do so right away, as even Petitioner's mother testified that she learned later that Ms. Steele had not sent the referral form. Ms. Steele had prepared a referral form, dated December 27, 2006, but neglected to send it to RSA. The question is, how long did it take for Petitioner's mother to follow up with RSA directly?

Ms. Barbour and Ms. Gripper testified consistently that the first contact from Petitioner's mother came in March 2007, and that Petitioner's mother first spoke with Ms. Gripper directly on April 3, 2007. This testimony was also consistent with the records of the Youth Transition Services Division of Respondent. Petitioner's mother testified that she first telephoned RSA and spoke to Ms. Gripper in January 2007.

After reviewing all the evidence, I find by a preponderance of the evidence that the RSA version is accurate, and that Petitioner's mother contacted RSA in March 2007. If Petitioner's mother had discovered in January 2007 that Ms. Steele had failed to send her form in, Ms. Steele would probably have sent her form to RSA in late January 2007, when Petitioner's mother would have informed her of the error. Ms. Steele sent the form to RSA in April 2007. This fact is consistent with the testimony of Ms. Barbour and Ms. Gripper that Petitioner's mother contacted them at that time.

I do not believe that Petitioner's mother was dishonest in her testimony. However, it is more likely than not that she was mistaken as to the time line.

## IV. Conclusions of Law

The purpose for the RSA program is to provide vocational rehabilitation services to eligible individuals with disabilities, and Respondent implements this program on behalf of the District of Columbia. *See* 34 C.F.R. § 361.57(b)(2); 29 DCMR 100; and 29 DCMR Chapter 1 *generally*. The parties agree that Petitioner has a disability and meets the criteria for the RSA program. *See* 29 U.S.C. § 722(a)(1).

Based on the arguments of the parties, the following issues are presented in this case:

(1) Whether Respondent met an asserted responsibility, under RSA law, to identify Petitioner as a person eligible to receive RSA services and to provide services to her, during the time that Petitioner received special education services from D.C. Public Schools;

(2) Whether Respondent timely determined Petitioner's RSA eligibility;

(3) Whether Respondent properly informed Petitioner of the standards it relied upon in denying her request to attend Hofstra University;

(4) Whether Respondent properly declined to develop an IPE for Petitioner's educational program for the fall 2007 semester; and

(5) If any violation of RSA law occurred, what is the appropriate remedy.

In considering these issues, I will also address, as appropriate, Respondent's defenses that: (1) Petitioner obligated herself to attend Hofstra before entering into an IPE obligating Respondent for this debt; (2) Hofstra's film production program is not eligible for RSA funding because it is not accredited; and (3) Petitioner does not need an undergraduate program for her vocational goal.

**A. Respondent's Obligations to "Identify" Disabled Students in D.C. Public Schools**

Petitioner argues that, during Petitioner's last two years of public education, Respondent had an obligation to identify her as a person who might be eligible for RSA services upon exiting high school, and that Respondent had an obligation to provide timely services to her under a transitional services program. For the following reasons, I disagree with this argument.

The undisputed facts in this case show that Petitioner attended the Chelsea School, a private special education program, until June 2007. She received special education services under an IEP, and was placed in the Chelsea School by D.C. Public Schools ("DCPS"). Petitioner was never identified, by either DCPS or Respondent, as a person who might be eligible for transition services to include the RSA program. It was only through her mother's efforts, that the RSA program was found for Petitioner. The question is whether Respondent had an obligation to do more than it did.

This issue was presented squarely in the case of *T.T. v. District of Columbia DHS,* OAH Case No. HS-P-06-101115. That case presented similar facts to the present case, in that T.T. attended a private school in Virginia under an IEP developed by DCPS. T.T. was never identified as a person who could benefit from the RSA program, and by the time his parent actually identified RSA as a program that could benefit him, it was too late to obtain RSA benefits for the fall 2005 semester. T.T. was found eligible for subsequent semesters, and an IPE was developed for the time period beginning with the spring 2006 semester.

In that case, both parties presented more extensive evidence and testimony concerning the agreements amongst DCPS, DHS, and other agencies with regard to providing transition services to disabled students. The predominant question in the case was whether Respondent violated its obligations under RSA law by failing to identify T.T. as a person eligible for transition services and by failing to provide services to him.

As noted in the *T.T.* case, OAH has no jurisdiction to determine issues arising under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.* OAH only has jurisdiction to hear adjudicated cases involving the RSA program, which was then administered

at the District level by DHS, and now by DDS. 29 U.S.C. §§ 700 *et seq.*; *see* D.C. Official Code § 2-1831.03(a)(2).

The Final Order in *T.T.*, in essence, held the following: (1) that Respondent was not obligated under RSA law to identify students under an IEP who may be eligible for transition services, pursuant to 29 U.S.C. §§ 705(a)(37) and 721(a)(11)(d); instead, Respondent's obligations were to consult with education officials and provide various planning roles and services to disabled students identified by education officials as being potentially eligible for RSA transition services; (2) that the Memorandum of Understanding ("MOU") amongst the various District agencies providing transition services, was legally sufficient to meet Respondent's obligations under RSA law, as the MOU designated DCPS as the lead agency for identifying such students, and the MOU only required Respondent to provide certain staffing in schools, certain educational activities, and certain RSA services to disabled students referred by DCPS; and (3) that Respondent had no obligation to fund an educational program for which T.T. had already applied and been accepted. *T.T. v. District of Columbia DHS,* OAH Case No. HS-P-06-101115 (Final Order, October 12, 2006); *see T.T. v. DHS,* (Order Denying Reconsideration, October 26, 2006) [addressing several issues raised by T.T. after the Final Order was issued].[7] The *T.T.* case is currently pending on petition for review before the District of Columbia Court of Appeals.

The issue here is nearly identical to that in the *T.T.* case. For the reasons stated in the Final Order and Order Denying Reconsideration, in the *T.T.* Case, I conclude that Respondent had no obligation, under RSA law, to identify Petitioner as a disabled student who might be

[7] All cases in this opinion without a LEXIS citation are being transmitted to LEXIS (www.lexis.com) for publication in the District of Columbia Office of Administrative Hearings database.

eligible for RSA transition services. The role of Respondent was subordinate to that of DCPS, which was charged with the duty to provide a free appropriate public education ("FAPE") to Petitioner under the IDEA. DCPS also had exclusive access to Petitioner's confidential educational records and related information.

I conclude that Respondent's obligation to provide transition services began when an application was made by Petitioner's mother for RSA services, which occurred at the latest on April 3, 2007. At that point, Petitioner was still attending high school. Therefore, I agree with Petitioner that as of April 3, 2007, Respondent had an obligation to provide transition services to Petitioner.

Under 29 U.S.C. § 721(a)(11)(D)(iv) and 34 C.F.R. § 361.22(b)(4), Respondent had an obligation at that point to provide outreach to Petitioner as an identified disabled student "as early as possible." Petitioner maintains that these provisions require an eligibility determination by the time Petitioner exited high school. I do not agree with this interpretation, as the language used in the statute and regulation is not that specific. The laws do indicate a need to provide "immediate assistance" to the disabled student. I will consider this language when discussing the next issue.

**B. Timely Eligibility Determination**

Pursuant to 29 U.S.C. § 722(a)(6), Respondent is required to determine an individual's eligibility for RSA benefits within 60 days after the individual has submitted an application. Then the agency must develop, with the individual's informed choice, a written IPE setting forth the employment outcome, services, provider, and methods used to procure the services. 29 U.S.C. §§ 722(b)(1) and (b)(2).

29 DCMR 101 sets forth the following process for referrals and applications: (1) an individual may apply directly or by referral from another source; (2) Respondent then schedules an orientation meeting to explain the process; (3) the individual may provide medical, social and vocational information to assist in the determination, and Respondent provides technical assistance to the individual; and (4) after orientation, Respondent then schedules an interview with a counselor, although this meeting can be waived by Respondent. RSA may schedule evaluations as appropriate to determine eligibility. 29 DCMR 103. After eligibility is determined, Respondent meets with the individual to develop an IPE. 29 DCMR 105.

Ms. Ford testified that Respondent uses the date of the initial interview as the starting point for the 60-day time limitation for eligibility determination. However, this is not consistent with 29 U.S.C. § 722(a)(6). The time limit starts to run when the application is made. At the very latest, Petitioner applied for RSA benefits on April 3, 2007, when her mother spoke with Ms. Gripper of the Youth Transition Services Division. In addition, one must consider the agency's duty, under the transition services provisions, to provide "immediate" assistance to the disabled student, and to provide outreach "as early as possible."

The absolute outside time limit for the eligibility determination was June 2, 2007, which was around the time of Petitioner's graduation. Respondent did not make its eligibility determination until July 20, 2007. This was an untimely decision.

The effect of the late decision was that it delayed every aspect of Petitioner's vocational program. Ms. Ford did not request approval of Hofstra as a vendor until July 26, 2007, and the denial came on July 31, 2007. This was on the verge of the new school year, and the delay severely limited the options available for the fall 2007 semester.

Finally, with regard to the eligibility determination, I note that there is no evidence that a written notice of eligibility was issued to Petitioner. Ms. Ford testified that she spoke by telephone to Petitioner and Petitioner's mother. However, this was not an adverse decision, and no prejudice was shown as a result of this failure. 29 U.S.C. § 722(c)(2); 34 C.F.R. § 361.43(b); and 29 DCMR 104(b) [all requiring written notice of adverse decisions]; *Shaw v. District of Columbia,* 238 F.Supp.2d 127, 137-39 (D.D.C. 2002) [holding that improper and untimely notice of delay in formulating an IEP for a disabled child did not require granting of relief, where no prejudice was shown as a result of the defective notice].

**C. Notice of the Basis for Denying RSA Benefits for Hofstra**

Petitioner's argument here has two prongs: First, she maintains that Respondent has an obligation to publish regulations in the D.C. Register, to cover every aspect of its decision-making policy with regard to the RSA program, and since Respondent relied on unpublished standards, its decision was unlawful. Second, she contends that the basis for denial is without merit.

As to the first argument, Petitioner relies upon 34 C.F.R. § 361.50(a), which requires states, including the District, to develop a state plan that includes the policies and procedures used to determine eligibility. From this regulation, Petitioner argues that Respondent cannot implement any policy that is not expressly written and published in accordance with the remainder of this regulation. I disagree with Petitioner's interpretation of the regulation, but I agree that the record here does not establish proper disclosure to Petitioner of the standards applied in Respondent's decision. I also agree with Petitioner that both of the reasons given for the denial are not supported as a matter of substance.

In *J.T. v. DHS,* OAH Case No. HS-P-06-101274, pp. 17-20 (Final Order, January 22, 2007), this administrative court held that the specific application of a general policy rule does not have to be published in the D.C. Register to be valid and enforceable. In that case, DHS sought to enforce its requirement that RSA clients attending out-of-state schools obtain double-occupancy housing, which is less expensive than single-occupancy housing. DHS had no published rule on this application, but it relied on its well-established requirements to seek comparable benefits. There was an additional problem in *JT* that DHS had provided conflicting information about the policy to her. The Final Order in that case held that, since this specific application of the policy was at variance with information provided to the client, DHS could show disclosure of the policy in one of three ways: (1) that the policy was disclosed orally to the client when the IPE was signed; (2) that written notice of the policy was provided to the client; or (3) that the policy was published in accordance with the Administrative Procedures Act, D.C. Official Code § 2-502(6).

In the present case, Cynthia Burley, the Chief of Client Services for Respondent, testified that Respondent does not have a specific policy that discusses certification/accreditation requirements for vendors. However, she cited 34 C.F.R. § 361.52(d)(4) for the proposition that federal program requirements forbid the use of RSA funds for non-accredited institutions. Section 361.52(c) and (d) provide in pertinent part:

> (c) Information and assistance in the selection of vocational rehabilitation services and service providers. In assisting an applicant and eligible individual in exercising informed choice … the designated State unit must provide the individual … information necessary to make an informed choice about the … providers of those services, that are needed to achieve the individual's employment outcome. This information must include, at a minimum, information relating to the –
>
> * * *

(3) Qualifications of potential service providers[.]

(d) Methods or sources of information. In providing or assisting the individual … the State unit may use, but is not limited to, the following methods or sources of information:

* * *

(4) Relevant accreditation, certification, or other information relating to the qualifications of service providers[.]

Applying this authority to the present case, there are several deficiencies in the record concerning the standards Respondent used to deny RSA funding for the Hofstra program. First of all, the written notice of denial was never submitted into evidence, so I am unable to review the basis for the denial given in the notice. Second, Ms. Ford testified that she gave inconsistent information to Petitioner, in that she told Petitioner one reason for denial was that she did not need an undergraduate program for film production, but that Respondent would consider an undergraduate program at a local college.

Third, Respondent contends that Hofstra's program is not accredited, but the standard used is not cleared. Hofstra itself is an accredited institution, and it has been approved as a vendor for D.C. TAP financial assistance. Further, Hofstra appears to be one of the leading institutions in the country for accommodating learning disabilities, such as the ones suffered by Petitioner. Hofstra's film production program is not certified by NASAD, but the evidence does not show why Respondent considers this organization to be the exclusive accrediting authority for film production programs.

The federal regulation cited by Respondent, 34 C.F.R. § 361.52(d)(4), does not bar use of funds for non-accredited institutions, but rather establishes this as a factor for consideration.

Since Respondent takes the erroneous position that federal funds cannot be used for a "nonaccredited" institution, presumably where an organization is nationally recognized as the only appropriate accrediting body, its policy cannot be upheld. Respondent treated this as an absolute bar.

In short, Respondent may have a valid reason for not funding the Hofstra program. However, it has failed to articulate a valid basis for this determination. I do not construe § 361.51(d)(4) as requiring the result achieved by Respondent based on this record. Indeed, Respondent could have relied on the same information, and determined that Hofstra was accredited and appropriate for Petitioner's needs.

As to whether Petitioner needs an undergraduate program for the vocational goal, Respondent's justification for its decision is hampered by the fact that it is inconsistently applied. Respondent applies it to a New York institution but not to Montgomery College. This is an arbitrary distinction. In addition, the DOL publication relied upon by Respondent, is also ambiguous. It states that most actors, producers and directors attend college, but that some succeed without it. This is not clear support for the proposition that a degreed program is not needed. As for Petitioner's certification by MCCAC, this is a factor that can be considered. However, the certification may be specifically limited to Montgomery County Cable's facilities. There is scant information in the record about what this certification means.

**D. Failure to Develop an IPE**

As noted above, once RSA eligibility is determined, the next step is for the vocational counselor and the client to develop an IPE, after the client has had an opportunity to make

informed choices about the programs and vendors. In this case, Respondent has not entered into an IPE because it has denied RSA funding for the program selected by Petitioner.

Respondent argues that it is not obligated to fund the Hofstra program because Petitioner obligated herself for this debt before entering into an IPE. Respondent has a valid point, in that Petitioner had decided to go to Hofstra before she had her interview. Respondent is certainly not obligated to fund Hofstra because of any agreement into which it entered.

However, this did not preclude Respondent from agreeing to fund this program as part of an IPE, and as stated above, the reasons given for denying funding for Hofstra were not logically or legally supported. In addition to the problems outlined in the last section, the two reasons given are not consistent with each other. If Petitioner does not need an undergraduate program, then it makes no difference whether Hofstra is accredited.

Petitioner has not been given a clear understanding of what type of IPE Respondent would negotiate. If the basis for the denial action is that Petitioner does not need any educational program, then Respondent may be denying RSA services altogether, or at least it is only offering employment support services. If the basis for the action is that Petitioner chose an unaccredited program, then Respondent may be offering a program at an accredited institution. Another implicit basis for the action is that Petitioner chose an out-of-state program. If so, Respondent may be willing to fund a local college, although the local colleges may not accommodate Petitioner's disability as well as Hofstra.

In short, Respondent did not obligate itself to pay for the Hofstra program. However, in its denial action, it has failed to give Petitioner an understanding of what type of program it will agree to fund.

## E. Appropriate Remedy

I have found that Respondent committed the following violations of its obligations under the RSA program: (1) it failed to timely determine eligibility; (2) it improperly notified Petitioner of its decision to deny coverage for the Hofstra program; and (3) it has failed to justify the reasons for the denial.

As a result of these errors, Petitioner did not learn until July 31, 2007 that Respondent would not fund her chosen program. The reasons given for the denial were not supported or internally consistent. It is not clear what standards were used in determining why Hofstra was rejected.

The appropriate remedy for these violations is to require Respondent to fund the program Petitioner selected, consistent with Respondent's rules and regulations. Therefore, I will order Respondent within twenty (20) days to enter into an IPE with Petitioner, to provide tuition, reasonable board, and appropriate related expenses for Petitioner's educational program at Hofstra, for the 2007-08 school year. In the event that the parties are unable to develop an appropriate IPE within twenty (20) days, either party may file a written request for additional relief.

Nothing in this Order precludes Respondent from denying RSA services for any subsequent school years. However, if Petitioner disagrees with any such actions, she may request another hearing.

## V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby, this _____ day of _____, 2007:

**ORDERED,** that Respondent District of Columbia Department on Disability Services's Motion for Reconsideration of the Order of Default, is **DENIED**; and it is further

**ORDERED,** that Respondent's July 31, 2007 decision to deny RSA services for Petitioner J.M.'s educational program at Hofstra University is hereby **REVERSED AND REMANDED**; and it is further

**ORDERED,** that within twenty (20) days following the issuance of this Order, Respondent shall enter into an Individualized Plan for Employment with Petitioner, that provides RSA funding for Petitioner's program of film production at Hofstra for the 2007-08 school year, in accordance with this decision; and it is further

**ORDERED,** that since this case is being remanded for further action, no appeal rights are listed in this Order.

December 11, 2007

____/s/_____
Paul B. Handy
Administrative Law Judge

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| J.M.<br>Petitioner,<br><br>v.<br><br>DISTRICT OF COLUMBIA<br>DEPARTMENT ON DISABILITY SERVICES<br>Respondent | Case No.: HS-P-07-101751 |

**LIST OF EXHIBITS**

The following exhibits were offered and admitted into evidence:

**I. Petitioner's Exhibits**

PX 103 - Computer-generated printout, "Colleges with Programs for Learning Disabled Students," dated August 1, 2007.

PX 104 - Computer-generated printout, "Hofstra University – The Program for Academic Learning Skills (PALS)," dated October 5, 2007.

PX 105 - Recommendation of Melissa A. Wood, Literacy Coordinator for the Chelsea School, dated August 30, 2007.

PX 106 - Vocational Rehabilitation Transition Referral Form, dated December 27, 2006, and Psychological Evaluation, dated January-February 2007.

PX 108 - Recommendation of Reginald Braxton, Producer/Director of ITI/HUD, dated October 9, 2007.

**II. Respondent's Exhibits**

RX 201 - Client Progress Note, Crystal Ford, dated May 22, 2007.

RX 204 - Vocational Services Needs, Ms. Ford, dated July 23, 2007.

RX 205 - Request for a New Vendor, Ms. Ford, dated July 26, 2007.

RX 208 - Client Progress Note, Ms. Ford, dated August 27, 2007.

RX 213 - Vocational Rehabilitation Transition Referral Form, dated December 27, 2006 [same as PX 106, in part].

RX 214 - E-mail message referring Petitioner to Client Services, from Jean Barbour to Cynthia Burley, dated April 10, 2007.

RX 215 - Letter from Ms. Gripper to Petitioner and her parents, dated April 9, 2007.

RX 215A - RX 213, but date-stamped received on April 10, 2007.

RX 216 - Vocational Rehabilitation Transition Referral Form, by Ms. Gripper, dated April 3, 2007.

RX 222 - Clients Rights and Responsibilities, dated May 22, 2007.

RX 224 - U.S. Department of Labor – Bureau of Labor Statistics – Bulletin 2600, "Actors, Producers, and Directors," dated October 3, 2007.